CHAPTER 6

SENIOR OFFICER LEGAL ORIENTATION

INTRODUCTION TO JUDICIAL ACTIONS

Introduction

In a perfect world the law would be fixed and eternal, but in reality, the law is man-made, fallible, and dynamic. Today's commander must be aware of the system and strive to apply it fairly and intelligently. This chapter will assist you in understanding the Uniform Code of Military Justice and the Manual for Courts-Martial, and in performing your duties as an integral actor in the military justice system.

It is not the purpose of this chapter to make you an expert in military justice. Rather, it is to expose commanders to the major requirements of military justice. This chapter is not intended to replace the basic sources to which it refers, or to do your thinking. It is only an aid, to be applied with sound discretion and mature judgment. There is a recurring theme throughout this guide; that is, the commander must seek the advice and assistance of the staff judge advocate. The "SJA" is your expert and adviser on military law; don't wait until your problem is out of control before seeking the staff judge advocate's counsel and advice.

A. Sources

1. The Constitution. The basic source for the separate system of criminal law in the military is the Constitution of the United States. Article I, section 8, of that document provides that Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces."

2. The UCMJ. In l950, Congress used its constitutional powers to enact the Uniform Code of Military Justice (UCMJ), which was substantially revised by the Military Justice Acts of l968 and 1983. This statute provides a separate system of military criminal law for the armed services, much the same as the State of California or the State of Maryland have separate systems of criminal justice to meet their societal needs.

3. The Manual for Courts-Martial. Like most other statutes, the Uniform Code of Military Justice requires a detailed set of rules to supplement and explain its various provisions. Article 36 of the UCMJ authorizes the President to make rules prescribing the procedures to be followed before military tribunals, including the rules of evidence. In addition, Article 56 empowers the President to establish the levels of punishment for most offenses. These rules are issued in the form of an Executive Order by the President and are found in the Manual for Courts-Martial, (2002 edition). Therefore, the Manual has the force and effect of law, and compliance is mandatory.

4. Army Regulations. In addition to the Manual, AR 27-10, Military Justice (6 September 2002), fine-tunes the everyday administration of military justice for the Army. This regulation announces additional rules and procedures that must be followed. Furthermore, many local commands issue supplemental military justice regulations. Commanders must also consult and comply with these regulations.

5. Court Decisions. While the Manual and Army regulations supplement and explain the UCMJ, the various courts involved with military criminal law interpret all of these sources of law. The Supreme Court of the United States and lower federal courts hear cases involving military criminal law. These cases are usually limited to (l) appeals based upon lack of jurisdiction and (2) appeals based upon a denial of some constitutional right. The United States Court of Appeals for the Armed Forces is the highest appellate court within the military judicial structure. This court is composed of five civilian judges appointed by the President and confirmed by the Senate for fifteen year tours. In addition, there is the United States Army Court of Criminal Appeals, an intermediate appellate court of review consisting of military appellate judges. The decisions of these courts interpreting statutes and regulations have the force of law and are binding upon commanders, judges, and counsel.

6. The Staff Judge Advocate. You can readily see from the above discussion that the sources of military criminal law are varied. To solve most military justice problems, you must refer to one or all of these sources. This is what the staff judge advocate is trained to do. The SJA is your legal advisor. Just as a corporation consults with its general counsel before making legal and business decisions, commanders should contact their SJA for advice in dealing with disciplinary problems.

B. Background and Development

1. Background. The UCMJ had its beginnings early in our history. Rules for the government of our Army have been in force since the time of the American Revolution, initially in the form of the Articles of War. The Second Continental Congress adopted the first Articles of War on 30 June 1775, just three days before George Washington took command of the Continental Army. These Articles were patterned after the British Army Articles, which were derived from earlier European articles traceable to the Middle Ages. Our system of military justice is the product of centuries of experience in many countries. Our present UCMJ is not, however, an outmoded historical relic. On the contrary, while retaining the substance of what has proven sound, Congress periodically reconsiders and revises the military justice system to reflect new knowledge, experiences, and law.

2. The Uniform Code of Military Justice, l950. The UCMJ was a significant revision in the military criminal law system. It combined the laws formerly governing the Army, Navy, and Air Force into one uniform code for all armed forces of the United States.

3. The Military Justice Act of 1968. A major revision of the Code and the Manual occurred with the Military Justice Act of 1968. The revised Code and Manual incorporated changes in the law since 1951 and substantially modified the military justice system.

The 1968 Act, among other things, instituted the position of military judge and gave soldiers the right to a qualified lawyer at a special court-martial in all but the rarest of circumstances. Article 27(c) provides an accused with representation by a qualified lawyer except where a lawyer cannot be obtained due to physical conditions or military exigencies. AR 27-10, Military Justice, paragraph 5-5a, goes even further by mandating that in all special courts-martial the accused must be afforded the opportunity to be represented by qualified counsel. Remember, this right to counsel is in addition to the accused's right to hire a civilian lawyer.

The 1968 Act, as implemented by AR 27-10, para. 8-1c(1), also provides that a military judge will be detailed to special courts-martial unless precluded by physical conditions or military exigencies. It also gives an accused the right to request trial by a military judge alone in all cases except those that are referred to trial as capital cases. If the accused elects trial by judge alone, the military judge determines the guilt or innocence of the accused and, if there is a finding of guilty, the sentence.

4. The Military Justice Act of 1983 again substantially revised the UCMJ. The Act relieved commanders of the administrative burden connected with personally excusing court-members before trial, eliminated requirements that commanders make certain legal determinations, and alleviated many redundancies in the system. The most significant revisions in the Act provide for direct review of Appeals for the Armed Forces decisions by the United States Supreme Court and authorized Government appeal of certain rulings by military judges at the trial level. This major revision was incorporated into the 1984 Manual for Courts-Martial.

The Military Justice Amendments of 1986 further refined the military justice system. The most significant change involved the expansion of court-martial jurisdiction to reach reserve component soldiers who commit offenses while in an Inactive Duty Training (IDT) status. In addition, the Act authorized, in limited circumstances, reserve component soldiers to be involuntarily called to active duty for the purpose of trial by court-martial, investigation under Article 32, UCMJ, or nonjudicial punishment.

After 1986, on an almost annual basis, national defense authorization acts made many minor changes to the UCMJ. For example, the Defense Authorization Act for Fiscal Year 2004 amended the statute of limitations for sexual offenses against children.

5. Changes to the Manual for Courts-Martial.

In 1980, the Joint Service Committee on Military Justice rewrote the Manual for Courts-Martial that took effect on 1 August 1984, replacing the Manual for Courts-Martial, 1969 (Rev. ed.).

6. The Trend. The trend in military justice legislation and court decisions is to increase the efficiency of our criminal justice system while balancing and protecting the rights of the accused. In light of these developments and continued public scrutiny of military justice matters, commanders must have a thorough knowledge of the system, and seek the advice of the staff judge advocate on all but routine matters.

C. Why a Separate System of Military Justice?

One of the unique features of our military society is its separate system of criminal justice. Most justice problems involving military personnel are resolved within this separate military justice system and only infrequently reach civilian criminal courts. Why do we have a separate justice system?

The succinct answer is: mission and location. The mission of the military is to defend the United States. No other institution has this mission. Because of this, many crimes in the military--AWOL, disobedience, disrespect--have no counterpart in civilian law. Our military justice system must function in wartime as well as in peacetime. This raises not only substantive, but also geographical problems for our state or federal civilian systems. Would a state or federal court be available in every part of the world where the United States might go to war? The answer is clearly no. Further, most state and federal laws are not extraterritorial, that is, they do not reach to foreign lands. Accordingly, we have our own military justice system that reinforces the military mission and goes wherever we go.

It is inevitable in a democratic society such as ours that the military justice system is compared with the civilian court system. While there are differences, in almost every instance, a military accused receives rights and protections equal to or superior to those enjoyed by civilian defendants. Commanders, however, must continue to administer military justice with utmost fairness and efficiency. By doing so, the trust and confidence bestowed upon commanders by the American people and the Congress will be preserved.

D. Jurisdiction of Courts-Martial

1. Active Duty Jurisdiction. On June 25, 1987, the Supreme Court decided the case of *Solorio v. United States*. This case dramatically changed the rules concerning court-martial jurisdiction. The Court held that jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on whether the offense is service-connected. The case overruled the "service-connection test" established by the Court in *O'Callahan v. Parker*, a 1969 decision. Now jurisdiction is established by simply showing that the accused is a member of the armed forces and committed the alleged offense while a member of the armed forces.

Now it is possible for both the military and civilian authorities may have jurisdiction over a soldier and his offense, *e.g.*, an offense committed off post. This will require SJA coordination with the local civilian prosecutor. Between the two, they will decide who can best prosecute the offender.

Civilians, including family members, are generally not subject to courts-martial jurisdiction. If they commit offenses on post, they may be tried in the local state, federal, or host-nation court. Commanders should consult with their SJA when issues arise involving misconduct by civilians.

2. Jurisdiction over Reservists. In 1986, Congress amended Articles 2 and 3 of the UCMJ to extend jurisdiction over reservists during all types of training; in short, if the reservist

is training, he or she is subject to military jurisdiction for crimes committed during the training period. The most significant change allows the military to exercise authority over reservists who commit crimes while performing weekend drill in inactive duty status.

Recognizing that inactive duty periods are brief, usually lasting only one weekend, the amendments to Article 3 allow reservists to return home at the end of an inactive duty drill without divesting the military of jurisdiction. As a result, nonjudicial punishment may be handled during successive drill periods. Specifically, while punishment can be imposed during one drill period, it can be served during successive drill periods. Additionally, under the new Article 2(d), the government can order to involuntary active duty those reservists who violate the UCMJ during a training period. Reservists can be involuntarily ordered to active duty for Article 32 investigations, courts-martial, and nonjudicial punishment.

Active duty convening authorities should be familiar with reserve jurisdiction because all general and special courts-martial are tried at the active duty post which supports the reserve component unit (includes National Guard units when federalized). Additionally, only the active duty general court-martial convening authority can authorize an involuntary recall to active duty of a reservist for the purpose of an Article 32 investigation, court-martial, or nonjudicial punishment. Army Regulation 5-9, appendix B-1, contains a list of active duty posts and the areas they provide reserve legal support.

3. Jurisdiction and Convening Authority.

A general court-martial convening authority may, pursuant to AR 27-10, para 5-2a(2), establish contingency plans which, when ordered executed, designate provisional units whose commanders may convene special courts-martial. A deploying general court-martial convening authority may, for example, establish a rear detachment whose commander has special court-martial convening authority.

A superior convening authority may withhold the authority of a subordinate convening authority to dispose of individual cases, types of cases, classes of offenders, or generally. A general court-martial convening authority establishing area court-martial jurisdiction is an example of a superior convening authority withholding authority from subordinate convening authorities. Establishing area court-martial jurisdiction usually results in more expeditious processing of military justice actions.

E. The Commander's Role in Military Justice

l. The Increasing Burden. Anyone who has compared the size and weight of the 1951 Manual for Courts-Martial with the 1969 or 1984 editions knows that military criminal law has greatly expanded in the past decades. The law of search and seizure, self-incrimination, lineups, and many other areas has burgeoned. In all contexts, the legal decisions commanders must make are increasingly technical. To help resolve these problems, the Judge Advocate General's Corps conducts training for commanders, provides military lawyers to commanders at all levels, and in many instances relieves commanders of administrative burdens associated with those increasing responsibilities.

2. The Commander and the Defense Function. The military defense counsel is frequently the lightning rod for criticism and hostility directed at the legal protections of the accused. Defense counsel occasionally succeed in getting cases dismissed because of excessive government delay, in having evidence excluded because of illegal searches or interrogations, and in winning acquittals or lenient sentences for the accused. In response, some have suggested, in a variety of phrases, that the military defense counsel ought to "ease off," ought to do less than can be done in order to ensure that "justice" is accomplished, or ought to be part of “the team.”. ANYTHING LESS THAN FULL AND ZEALOUS REPRESENTATION WITHIN THE LIMITS OF THE LAW IS INSUFFICIENT UNDER ETHICAL AND CONSTITUTIONAL STANDARDS. The defense counsel who does not fully and vigorously represent a client is professionally derelict. In fact, by zealously representing soldiers, defense counsel increase good order and discipline in the Army by ensuring the fair administration of military justice. Those who fear that defense counsel are unfettered in their efforts for the accused should be aware that counsel practice under strict cannons of professional conduct; these are found in the UCMJ itself, the Manual for Courts-Martial, the Rules of Professional Conduct for Lawyers (AR 27-26), and ethical standards established by the American Bar Association. These rules are vigorously enforced. The Judge Advocate General's Professional Responsibility Advisory Committee investigates allegations of counsel misconduct and recommends disciplinary action to The Judge Advocate General.

Before the 1968 legislation which injected military lawyers into special courts-martial, officers from all branches prosecuted and defended cases in that forum. That experience created an understanding for both the prosecution and defense role. Without this experience, commanders now participate only in the law enforcement or court member functions. Some tend to be intolerant of the defense function. Many commands alleviate this problem by providing young Army leaders a more balanced picture of the prosecution and defense function through temporary assignment to local JAG offices and other educational programs. These include requiring lieutenants to attend the court-martial of a member of the battalion and officer professional development classes taught by judge advocates.

On a practical level, commanders should recognize that defense counsel are fellow officers who provide an important service to the command. They should acknowledge the importance of this service by following these simple rules: (1) allow the defense counsel easy access to you and your soldiers to discuss a case or locate a witness; (2) provide soldiers with a copy of the Article 15 specification(s) and *supporting documents* so the defense counsel can provide thorough and proper advice on whether to accept the Article 15 proceeding; and (3) avoid derogatory comments about the defense counsel or the defense function. Instead, teach your officers and NCOs the importance of the defense functions.

3. The Commander's Prosecutorial Discretion. One of the commander's greatest powers in the administration of military justice is the exercise of prosecutorial discretion--to decide whether a case will be resolved administratively or referred to trial, and what the charges will be. The Manual for Courts-Martial mandates two rules in this area. First, cases should be resolved in a timely manner at the lowest possible level consistent with the seriousness of the offense and the record of the offender.

Second, a commander should refer a case to a court-martial only when there are reasonable grounds to believe a crime was committed and the accused did it. Although further advice can be, and in many cases must be sought from your SJA, with few constraints, the commander must ultimately decide how to dispose of alleged misconduct. One such constraint, Article 34, UCMJ, is discussed below.

Any decision should be made with an understanding of the array of alternatives. Military justice procedures are not always the best way to dispose of disciplinary problems; courts-martial and Article 15's are sometimes slow, cumbersome, and blunt instruments, unsuited to the incident, the accused, or the commander's purpose. Short of military justice remedies, a variety of administrative alternatives exist:

a. Counseling.

b. Written or oral reprimands and admonitions.

c. Withdrawal of pass privileges.

d. Withdrawal or limitation of other privileges--commissary, PX, check-cashing, on-post driving, etc.

e. Extra training.

f. Alcohol and drug rehabilitation programs.

g. EER and OER.

h. MOS reclassification.

i. Reduction for inefficiency.

j. Administrative separation.

k. Bar to reenlistment.

l. Compassionate reassignment.

m. Transfer.

And the list goes on. The rapid development of these alternatives to court-martial has highlighted the past decade of military law, and with almost all of these remedies, the power to take final action is passed down to field commanders. In the case of any minor incident, the commander exercising prosecutorial discretion should first decide that none of the varied administrative remedies is sufficient before considering punitive options.

The decision to refer offenses to trial by court-martial is difficult. Occasionally the decision is made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to "do something." Congressional inquiries and expressions of

interest in the incident from higher command tempt some to refer cases to trial to settle the matter. "Let the court decide whether or not the accused is guilty." A CASE SHOULD NEVER BE REFERRED TO TRIAL UNLESS THE CONVENING AUTHORITY IS PERSONALLY SATISFIED THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE AND SHOULD BE PUNISHED. In fact, prior to referring a case to general court-martial, and in the Army, to a BCD Special Court-Martial, the convening authority must seek the advice of his staff judge advocate. This advice, mandated by Article 34 of the UCMJ, requires the Staff Judge Advocate to opine as to whether: (1) there is jurisdiction over the offense; (2) there is probable cause to believe that an offense was committed and the accused committed it; and (3) that the specification states an offense. If there is a deficiency in any one of these three required areas, the court-martial convening authority CANNOT refer the offense to trial. In other words, the Staff Judge Advocates negative advice in any of these three areas is binding on the convening authority. In addition, Article 34 requires the Staff Judge Advocate to recommend what action the convening authority should take with respect to the charges and specifications. Unlike the advice in the previous three areas, the SJA's recommendation on action is advisory only.

The perceptive commander will find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, interests of justice, or other considerations, the accused should not be punished. Similarly, commanders must not refuse to use the military justice system in order to create a rosy statistical picture of morale and discipline; serious crime is an unfortunate but inevitable facet of human conduct and should be prosecuted.

The military justice system requires commanders to exercise Solomon-like judgment--and, if necessary, to stand alone for the right as they see it. At all times the staff judge advocate or legal advisor is available to advise, but except as limited by Article 34, discussed above, the final decision rests with commanders.

In any case of public interest, a commander's decision will be examined and reexamined. Because of restrictions on pretrial publicity and the danger of influencing subordinates, witnesses, or panel members, commanders are often unable to defend decisions in public. Do not permit possible public reaction to deter you from making a decision you believe is correct. Think long and hard in making these decisions, and ensure that the decision to refer a case to trial on particular charges can withstand the kind of close scrutiny it may receive. This does not mean that you should hesitate to take necessary disciplinary action or tolerate an atmosphere of permissiveness. Rather, your actions must be proportionate to the misconduct you seek to sanction.

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Teaching Outline

At least since the harsh days of Gustavus Adolphus, governments have striven to strike a perceived balance of fairness in substantive and procedural law as applied to members of the military force, a balance which primarily takes into account the vital mission of the force itself. Often this balance is described in a specialized criminal code.

General William C. Westmoreland
Major General George S. Prugh
Harvard Journal of Law and Public Policy 1 (1980)

I. NEW DEVELOPMENTS IN CRIMINAL LAW

Recent changes:

1. SPCMCA may convene BCD Special

2. Max punishment for Special Court-Martial raised to 1 year

3. Life without possibility of parole

4. May change Art 15 filing determination

II. MILITARY JUSTICE SYSTEM—LEGAL BASIS.

A. Constitution of the United States.

Article I, section 8, clause 14. "The Congress shall have Power . . . to make rules for the Government and Regulation of the land and naval Forces."

B. Uniform Code of Military Justice.

1. Congress exercised its power in 1950 to provide one statute to govern all the Armed Forces.

2. Provides President with authority to decide pretrial, trial, and post-trial procedures (Article 36) and maximum punishments (Article 56).

C. Manual for Courts-Martial.

1. Executive Order of the President; implements Congress' grant of authority to decide procedures and maximum punishments.

2. Organized into five parts plus appendices.

I. Preamble

II. Rules for Courts-Martial (R.C.M.)

III. Military Rules of Evidence (M.R.E.)

IV. Punitive Articles

a. Text of Article from UCMJ
b. Elements of the offense
c. Explanation
d. Lesser included offenses
e. Maximum punishment
f. Sample specification

V. Nonjudicial Punishment Procedure

VI. Appendices (currently 25)

a. Constitution
b. U.C.M.J.
c. Appendices of forms, Trial Guides, Analysis

D. DoD Instructions.

E. Service Regulations.

1. AR 27-10 (6 Sep. 2002) prescribes the policies and procedures pertaining to the administration of military justice within the Army and implements the Manual for Courts-Martial, United States.

2. AR 635-200 describes policies and procedures for administrative separations. There are several additional regulations covering specific types of adverse administrative action. *See* outline for Adverse Administrative Actions.

F. Court Decisions.

III. THE MILITARY COURT SYSTEM.

A. Trial Courts

1. Summary Court-Martial.

2. Special Court-Martial.

3. BCD Special Court-Martial.

4. General Court-Martial.

B. Appellate Courts.

1. Army Court of Criminal Appeals (formerly Army Court of Military Review).

Appellate military judges (COLs and LTCs) review cases in which sentence includes death, punitive discharge (Dismissal, DD, BCD) or confinement for one year or more.

2. United States Court of Appeals for the Armed Forces (CAAF) (formerly Court of Military Appeals).

   Five civilian judges review cases in which death penalty is adjudged, The Judge Advocate General certifies for review, or the court grants accused's petition for review.

3. United States Supreme Court.

   Accused or government may appeal cases decided by the CAAF to the Supreme Court.

IV. THE MILITARY JUSTICE SYSTEM—PERSONNEL.

A. Major Players:

1. Commander.

2. Staff Judge Advocate.

3. Trial Counsel.

4. Defense Counsel.

5. Military Judge.

6. Court Members.

7. Legal Specialist/Court Reporter.

B. Other Players:

1. Victims, witnesses (VWAP liaison)

2. IG

3. FACMT

4. Congress

5. Press

V. JURISDICTION.

A. Court.

1. Court must be properly convened.

2. Area court-martial jurisdiction.

3. Proper designation of court-martial convening authority.

B. Person.

Accused must be subject to court-martial jurisdiction, *i.e.*, a member of the Armed Forces.

C. Offense.

1. The offense must be subject to court-martial jurisdiction.

2. Court-martial jurisdiction depends on the accused's status as a member of the Armed Forces.

D. Reserve Jurisdiction.

1. UCMJ jurisdiction continues over Reservists after a period of active duty for any offenses committed during the active duty.

2. Reservists may be involuntarily recalled to active duty for court-martial, Article 32 investigations, and nonjudicial punishment.

VI. CONCLUSION.